Nos. 90-1262 and 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

THE STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF CHAMPION INTERNATIONAL CORPORATION, AMERICAN PAPER INSTITUTE, NATIONAL FOREST PRODUCTS ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, AMERICAN MINING CONGRESS, THE FERTILIZER INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, ASSOCIATED INDUSTRIES OF ARKANSAS, ARKANSAS FEDERATION OF AIR AND WATER USERS, INC., AND ARKANSAS POULTRY FEDERATION IN SUPPORT OF PETITIONERS

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Champion International Corporation, the American Paper Institute, the National Forest Products Association,

the American Iron and Steel Institute, the American Mining Congress, The Fertilizer Institute, the Chemical Manufacturers Association, the National Association of Manufacturers, the Associated Industries of Arkansas, the Arkansas Federation of Air and Water Users, Inc., and the Arkansas Poultry Federation ("industry *amici*") file this brief *amici curiae* in support of petitioners State of Arkansas, *et al.*, and request that the decision of the lower court be reversed.[1]

INTERESTS OF *AMICI CURIAE*

Industry *amici* represent private manufacturing, processing, mining, and other companies whose interests are vitally affected by the lower court's rulings interpreting the Clean Water Act.

The American Paper Institute is a non-profit trade association whose members include companies which account for approximately 90 percent of the domestic manufacture of pulp, paper, and paperboard, many of whom own or operate facilities which discharge treated process wastewater to interstate waterways or their tributaries in conformance with the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988).[2]

Champion International Corporation ("Champion") is a member of the American Paper Institute and one of the

[1] Industry *amici* also agree with petitioner U.S. Environmental Protection Agency ("EPA") that the lower court's decision should be reversed, but oppose any suggestion that an affected downstream state's water quality standards automatically or strictly apply to an out-of-state source.

The consent of counsel for each of the parties has been obtained and a letter from each counsel indicating his consent to the filing of this brief has been filed with the Clerk.

[2] Citations in this brief are to the Federal Water Pollution Control Act, as amended, commonly referred to as the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §§ 1251-1387 (1988). Parallel citations to the United States Code are provided in the Table of Authorities.

nation's largest producers of pulp, paper, and solid wood products. Champion owns and operates numerous mills and other facilities in North Carolina, Florida, Michigan, and elsewhere which discharge treated process wastewater to interstate waterways in accordance with Clean Water Act permits issued under the National Pollutant Discharge Elimination System ("national discharge" or "NPDES" permits), CWA § 402. Champion's Canton, North Carolina mill, which discharges treated process wastewater to a river that flows into Tennessee some 26 miles below the mill, has been the subject of a long-standing dispute between the States of North Carolina and Tennessee over the applicable "color" standard for a renewal of the Canton mill's national discharge permit.[3]

Champion also operates and is seeking an NPDES renewal permit for a mill in Pensacola, Florida, which discharges treated process wastewater to a stream that empties into Perdido Bay (a boundary water between Florida and Alabama), to which the State of Alabama has objected.[4] In both of these cases, the "affected states" of

[3] Champion is currently a petitioner before the U.S. Court of Appeals for the Fourth Circuit regarding an EPA-issued NPDES renewal permit for the Canton, North Carolina mill, in which EPA's reliance upon Tennessee's federally-approved water quality standard for color is at issue. *Champion Int'l Corp. v. EPA*, No. 91-2302 (4th Cir. *petition filed* Jan. 3, 1991). In denying Champion's request for an evidentiary hearing on the applicability of North Carolina's own federally-approved color standard—which EPA rejected *without* a finding of any "undue impact on interstate waters" in Tennessee—the EPA Administrator cited and relied upon the Tenth Circuit's decision below in *State of Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990). Briefing has been suspended pending a decision by this Court in the present case.

[4] The Attorney General of Alabama has filed a request for an evidentiary hearing on a recent EPA-issued renewal permit for Champion's Pensacola, Florida mill. The basis of Alabama's request is that the permit fails to insure compliance with Alabama's water quality standards, including its "non-degradation" policy, in keeping with the Tenth Circuit's decision below. EPA has not yet ruled on whether to grant Alabama's hearing request.

Tennessee and Alabama have contended that their differing or more stringent state water quality standards must be met by Champion's out-of-state discharges. These two cases illustrate the problem which the Tenth Circuit's decision poses for industrial discharges to interstate waterways and their tributaries.

The National Forest Products Association, the American Iron and Steel Institute, the American Mining Congress, The Fertilizer Institute, and the Chemical Manufacturers Association are national trade associations of the timber, steel, mining, fertilizer, and chemical industries, respectively, each representing a majority of the companies within their respective industries, many of whom discharge treated process wastewater to interstate waterways or their tributaries in conformance with the Clean Water Act.

The National Association of Manufacturers is a national organization which represents the business interests of large and small manufacturers, including their interest in the proper administration of the Clean Water Act with respect to discharges to interstate waterways.

The Associated Industries of Arkansas, the Arkansas Federation of Air and Water Users, Inc., and the Arkansas Poultry Federation are statewide associations which collectively represent a majority of Arkansas manufacturing companies, many of whom discharge treated process wastewater directly to interstate waterways or into publicly-owned treatment works (such as the City of Fayetteville's treatment plant) which discharge to interstate waterways.

The two principal statutory rulings of the Tenth Circuit under review by this Court are that the Clean Water Act

(1) forbids the permitting of any discharge to an interstate waterway in Arkansas (or any other "source state") unless the permit also insures compliance with the state water quality standards of Oklahoma (or any other "affected state"), and

(2) forbids the permitting of any new or increased discharge to a waterway not currently meeting applicable water quality standards.

These two *unprecedented* Clean Water Act rulings are a radical departure from past administrative and judicial interpretations of the Act. If upheld, they will fundamentally change the way the Clean Water Act affects industrial, municipal, and other discharges to interstate waterways. No longer will a discharger to an interstate waterway be able to rely, for Clean Water Act compliance purposes, solely or even principally on the federal and state laws and regulations which apply in the discharger's home state. No longer will a state "downstream" from a proposed discharge merely have the right to "object" on a case-by-case basis and "recommend" that its differing or more stringent water quality standards be considered in a particular permit. Instead, under the Tenth Circuit's decision, EPA is required to *insure* that *every* proposed discharge to an interstate waterway will comply with the water quality laws and regulations of *every* potentially affected downstream state, to whatever extent the downstream state's water quality standards or other requirements are different from or more stringent than those of the source state.

For the first time, EPA is virtually compelled by the Tenth Circuit's decision to adopt complex new procedures requiring the submission of advance demonstrations, certifications, or similar means of insuring, if possible, that all downstream state standards will be met, in every case, by a newly-permitted upstream state discharge. The lower court's decision thus will impose substantial new Clean Water Act permit burdens—and potential new control requirements or discharge prohibitions—on thousands of new and existing industrial, municipal, and other facilities which propose new, increased, or continued discharges of treated process wastewater to interstate rivers and streams, lakes

and reservoirs, bays, estuaries, and coastal waters nationwide.

For example, a discharger located in northeast Ohio on a tributary of the Ohio River will be required to show that its discharge will not have the potential to cause or contribute (even by an *undetectable* amount, according to the Tenth Circuit) to the violation of any different, additional, or more stringent water quality standards adopted by the downstream states of Pennsylvania, West Virginia, Kentucky, Indiana, Illinois, Missouri, Tennessee, Arkansas, Mississippi, and Louisiana. To try to prevent the possibility that any newly-proposed downstream state standards might preclude the construction, expansion, or continued operation of its Ohio-based facility, the Ohio source will have to participate in the water quality standards-setting activities of all these downstream states and, if possible, make sure the downstream state standards do not present insurmountable compliance concerns beyond the standards which apply in Ohio.[5] Moreover, it can be expected that the Ohio source will have to actually *demonstrate*, in conjunction with its Ohio Clean Water Act discharge application, that no potentially relevant numerical, narrative, or "non-degradation" standards of any downstream states

[5] Prior to the Tenth Circuit's decision, most companies and municipalities operating and discharging in one state would have had no particular reason to be informed about the water quality standards of downstream states, much less have had the need or the opportunity to participate in their standards-setting activities. Now, all of a sudden, they *must* do so or suffer unacceptable future consequences. Perhaps even more important, they suddenly have become subject to hundreds of downstream state standards *already in existence*, without notice and opportunity to have been heard regarding the adoption of such standards. The Ohio-based discharger's only alternatives, with respect to existing downstream state standards, will be to attempt to comply, attempt to have the downstream standards changed, or stop operating his facility (or abandon plans to construct a new facility or expand an existing facility).

will be violated.[6] No such downstream state standards compliance demonstration is required on the face of the statute or under any prior interpretation of the statute.[7]

The Tenth Circuit's decision also means that a downstream state has the power unilaterally to preclude upstream state industries and municipalities from constructing new discharging facilities, expanding operations at existing facilities, or even continuing to operate existing plants under a newly-issued permit. That is, under the lower court's decision, any state whose water quality may be affected by upstream state sources will be able to adopt a "total elimination of discharges" policy or a strict "non-degradation" rule *applicable at the state line*, or perhaps simply adopt different or more stringent pollutant-specific standards, and thereby preclude discharges (and thus commercial activity) from being permitted in the upstream state. No such direct or indirect downstream state power to regulate or prohibit out-of-state discharges (or

[6] EPA regulations prohibit the issuance of a permit unless all applicable requirements of the Act will be met, including requirements under the water quality laws of the source state. 40 C.F.R. § 122.4. It is the applicant's burden to obtain a source state certification that the relevant source state requirements will be met. *See* 40 C.F.R. Part 121 and 40 C.F.R. § 124.53. It is impossible to predict exactly what kind of downstream state standards compliance demonstration may be required by the Tenth Circuit's decision, what it will cost, or whether it is feasible at all. It is conceivable that the "responsible corporate official" who signs the Ohio permit application would be required to certify, under pain of criminal and civil sanctions, that the proposed discharge complies with all relevant downstream state standards.

[7] The Act presupposes that *EPA*, and not an individual permit applicant, will insure through EPA's state water quality standards-approval process that all states adopt standards which *consistently* meet minimum federal water quality requirements. To the extent any individual state chooses to adopt (and EPA "approves") standards more stringent than the Act requires, such state standards generally cannot be treated as "federal standards." See notes 16 and 17, *infra*, and accompanying text.

interfere with interstate commerce) is authorized by the Act or any prior interpretation of the Act.

Recognizing that conflicts could arise between two or more states regarding the application of differing state water quality standards to shared interstate waterways, the Clean Water Act expressly grants *EPA* the exclusive authority to resolve interstate water quality disputes. That is, when brought to EPA's attention by a downstream state's "objection" or "recommendation" regarding a particular upstream state discharge application, EPA must *consider* (but need not necessarily apply) the water quality standards of the downstream state. The Act thus leaves no room for the Tenth Circuit's contrary inference (much less any room for a contrary finding of "unmistakable" authorization by Congress) that affected state standards apply automatically to out-of-state sources and thus may burden interstate commerce freely at the discretion of the downstream state.

SUMMARY OF ARGUMENT

The Tenth Circuit's unprecedented ruling that the EPA-approved water quality standards of downstream "affected states" must be met by an out-of-state discharge sweeps aside express provisions of the Clean Water Act. Congress expressly provided in § 303(c)(3) of the Act that a federally-approved state water quality standard "shall thereafter be the water quality standard for the applicable waters *of that State*" (emphasis added). Moreover, when a water quality dispute arises between states sharing an interstate waterway, Congress expressly granted EPA exclusive, case-by-case *discretionary* authority to resolve such a dispute, whether the permit is one issued by EPA or the source state. Thus, the Act's express water quality standards dispute resolution provisions, §§ 401(a)(2) and 402(d)(2) of the Act, do not extend the reach of a downstream state's federally-approved water quality standards beyond the waters "of that State." In ruling to the contrary, the

Tenth Circuit ignored this Court's teaching in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) ("*Ouellette*"), spelling out the "subordinate" status of a downstream state's water quality standards and finding that any *exceptional* EPA decision to base an upstream state discharge limitation on a downstream state standard is authorized only when EPA determines that the failure to do so would have an "undue impact on interstate waters" in the downstream state.

The Tenth Circuit's second unprecedented ruling, that no new or increased discharge may be permitted into (or upstream from) a waterway not currently meeting applicable water quality standards, is based on an equally flawed reading of the Act. Although stringent conditions are required in permitting new or increased discharges, the statute has never been read to forbid categorically any new or increased discharges to such waters. Even assuming, for example, that a downstream state's "non-degradation" standard were to apply automatically to an out-of-state source (which it does not), the Act nowhere prohibits absolutely any new or increased discharge to a waterway not currently meeting that water quality standard.

ARGUMENT

I. The Act Requires That A Source Comply With Applicable Federal Standards and Source State Standards

A brief statement of the statutory context of the two issues discussed here may be helpful. The succinctly-stated objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a). The means by which the Act's stated objective is to be achieved are set forth in a series of interrelated provisions for federally-established, technology-based effluent limitations and other national standards, for state-established ambient (in-stream) water

quality standards, and for case-by-case permitting of individual proposed discharges.

The establishment of federal technology-based effluent limitations and other national standards—none of which is at issue in this case—is solely within the province of the EPA Administrator. CWA §§ 301, 302, 304, 306, and 307. With respect to state-by-state establishment of in-stream water quality standards, however—such as the Oklahoma "non-degradation" standard at issue here—the Act provides a more complex and flexible scheme.[8]

The Act directs the Governor of each state to adopt in-stream water quality standards for all waters of the United States within each individual state (both intrastate and interstate waters) and to submit such state standards to the EPA Administrator. CWA §§ 303(c)(1) and (2). State standards are to be based, at least in part, on EPA-recommended ambient water quality "criteria" and other scientific information developed and published by the EPA Administrator, and are to reflect state-designated "uses" of particular water bodies within the state (reflecting each state's socio-economic balancing of the needs and desires of its own citizens). CWA § 304. If the Administrator determines that a state standard meets the water quality

[8] Historically, as under the current Act (*e.g.*, §§ 101(b), 303(c), and 402(b)), Congress has recognized the rights and responsibilities of individual states to define their own water quality goals and standards, including appropriate uses of particular waterways. Federal water pollution control legislation which preceded the comprehensive Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972), was based entirely on state-established, in-stream water quality standards, which virtually all states adopted and the federal government approved before 1972. *E.g.*, Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965). The federal government's role before 1972 was confined largely to supporting state programs and mediating the application and enforcement of state standards with respect to interstate waters. *See* Zener, "The Federal Law of Water Pollution Control," *Federal Environmental Law* (E.L. Dolgin and T.G.P. Guilbert eds. 1974) 715.

requirements of the Act for the state-designated uses, the state standard thereupon becomes "the water quality standard for the applicable waters of that State."[9] CWA § 303(c)(3). The term "applicable waters of that State" necessarily refers to waters *within* the state. Traditional notions of state sovereignty and federalism, as well as the Commerce Clause of the Constitution of the United States, Art. I, § 8, do not ordinarily allow the extra-territorial application of a state's individual water quality standards to sources located outside that state's jurisdictional boundaries. See pp. 22-25, *infra*.

Federal effluent limitations and other federally-promulgated standards, together with source state water quality standards, provide the foundation for case-by-case permitting of discharges of industrial, municipal, and other effluents to waters of the United States. National discharge permits may be issued by EPA under § 402(a) of the Act, or by the source state in the case in some 39 states which have § 402(b) EPA-approved state NPDES permit programs.

Section 402(a) of the Act authorizes the EPA Administrator to issue NPDES permits under condition that the Act's "applicable requirements" will be met, including any more stringent permitting standards under state law in

[9] If a state-submitted standard is found to be insufficient to meet federal requirements (and, after notice from EPA, the state fails to adopt an appropriate standard), the EPA Administrator may promulgate a *federal* water quality standard for the state. CWA § 303(c)(4). An important factual distinction must be made between "federally-approved" *state* water quality standards—which all states have in great numbers and are required to review at least every three years—and *federal* water quality standards promulgated by EPA, which are exceedingly rare. EPA has long recognized an equally important *legal* distinction between these two forms of water quality standards adopted pursuant to the Clean Water Act. See note 16, *infra*.

accordance with § 301(b)(1)(C).[10] See pp. 14-15, *infra*. Whenever EPA is the permit-issuer, as here, the *source state* also must certify to EPA that the proposed discharge complies with all relevant federally-promulgated effluent limitations and standards, as well as the source state's water quality standards and any other more stringent source state requirements.[11] CWA §§ 401(a)(1) and (d).

If a particular proposed discharge "may affect" the waters of another state, EPA must notify the potentially affected downstream state of the permit application and provide that state an opportunity to "object" and request an EPA hearing.[12] Based upon any "recommendations" of an affected state, EPA's own evaluation, and any additional evidence submitted, EPA is then required to condition the permit "as may be necessary" to insure compliance with "applicable water quality requirements." CWA § 401(a)(2).

The situation thus can arise for a permit issued by EPA under § 402(a), as presented here, wherein EPA determines and a source state certifies that a proposed discharge will comply with all applicable federal and source state requirements, but a downstream state believes its water quality "will be affected" and that its additional or more stringent requirements should be made "applicable" by EPA. In this situation, § 401(a)(2) of the Act imposes upon EPA a duty to *consider* the downstream state's "objection" or "recommendation" and grants EPA the *discretion* to determine what permit conditions are "necessary."[13] Section 401(a)(2) does not define, however, what requirements are "necessary" to protect downstream state water quality, thus leaving for EPA to determine the "applicable water quality requirements" on a case-by-case basis.

[10] Section 402(a)(3) provides that an EPA-issued permit "shall be subject to the same terms, conditions, and requirements as apply to a [§ 402(b)] State permit program and permits issued thereunder . . ."

[11] "The CWA therefore establishes a regulatory 'partnership' between the Federal Government and the source State." *Ouellette*, 479 U.S. at 490.

[12] "While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States)." *Ouellette*, 479 U.S. at 490.

II. The Act Does Not Require That "Affected State" Standards Be Met By An Out-of-State Source

In arguments presented to the court below, EPA and the State of Oklahoma relied heavily on § 301(b)(1)(C) of the Act to discern the meaning of "applicable water quality requirements" pertinent to this case. This provision states that, in order to carry out the Act's objective, there shall be achieved, by July 1977, "any more stringent limitation [than EPA-promulgated effluent limitations] . . . established pursuant to any State law or regulations (under authority preserved by section 1370 [§ 510 of the Act]) . . . or required to implement any applicable water quality standard established pursuant to this [Act]." According to

[13] The Act also clearly grants EPA the *discretion* to protect downstream water quality by requiring additional restrictions when the source state, instead of EPA, is the permit-issuer and the source state must notify other states of potential downstream state impacts. In such a case, pursuant to §§ 402(b)(5) and 402(d)(2), when a downstream state complains that its water quality will be affected, EPA has a duty to evaluate any "recommendation" of the downstream state and the reasons why the source state declined to accept (if such is the case) the downstream state recommendations. The EPA Administrator then may or may not, in his discretion, object to the proposed permit and preclude its issuance by the source state. In *Ouellette*, this Court characterized EPA's discretion in terms of an EPA determination of whether the proposed upstream state discharge would have an "undue impact" on interstate waters. 479 U.S. at 491. Thus, when the source state, instead of EPA, is the permit-issuer—which is how the vast majority of Clean Water Act permits are issued in the 39 states with approved NPDES permit programs—EPA obviously is *not required* to insure compliance with the water quality standards of affected downstream states.

the Tenth Circuit, if *any* state (including, but not necessarily limited to, the source state and any downstream state) has adopted, pursuant to § 510, an effluent limitation more stringent than the appropriate EPA-promulgated effluent limitation, or if *any* state has determined that a more stringent limitation is required to implement a water quality standard which that state has adopted pursuant to § 303(c), then EPA must treat *any* such state's more stringent limitation as an "applicable water quality requirement" under § 401(a)(2). This interpretation of the Act will not withstand scrutiny.

A. Sections 301(b)(1)(C), 303(c), and 510 Do Not Mandate Compliance With "Affected State" Standards

An important statutory construction issue is whether, in the context of a *particular proposed permit*, the Tenth Circuit correctly interpreted the phrases "any State law or regulations" and "any applicable water quality standard" in § 301(b)(1)(C) to refer, literally, to the laws, regulations, and standards of any and all states (source states, downstream states, *and* all other states), or whether they are intended to require compliance only with the more stringent laws or regulations of the kind preserved under § 510 for the *source state* to administer and the *source state's* more stringent water quality standards.[14]

Industry *amici* submit that, when read in the context of a particular permit application, §§ 301(b)(1)(C), 303(c), and 510 have nothing to do with the issue of whether a downstream state's requirements (much less any other state's requirements) must be met. The title of § 301(b)—

[14] If the lower court's literal "any State" interpretation is correct, it could produce the absurd result that a discharge located in New York might be subjected to a more stringent limitation established by the State of California since § 301(b)(1)(C), by its own terms, would not require for such a more stringent state limitation to be "applicable" that it exist in a state which is even "affected" by the proposed discharge.

"Timetable for achievement of objectives"—indicates that this section has to do with the schedule for achieving the Act's various standards and requirements, rather than defining or creating any "applicable water quality requirements" of the Act. Only by reference to §§ 303 and 510 does § 301(b)(1)(C) *incorporate* the right of a state to establish—for application within its own boundaries—certain standards or other requirements which are more stringent than those mandated by the Clean Water Act. Significantly, § 301(b)(1)(C) does *not* incorporate by reference any "requirements" of an affected downstream state under § 401(a)(2) of the Act. Therefore, § 301(b)(1)(C) can only reasonably be interpreted to refer to more stringent requirements of the kind preserved under § 510 for *source state* administration and more stringent § 303(c) *source state* water quality standards (which, it is significant to note, are the *only* state law requirements subject to a § 401 compliance certification).

In sum, there is nothing in §§ 301(b)(1)(C), 303(c), or 510 to suggest that Congress intended these provisions to subject an out-of-state source to the differing or more stringent requirements which a *downstream state* (or any other state) might choose to adopt and apply to its own resident sources. Such an expansive interpretation of §§ 301(b)(1)(C), 303(c), and 510 would nullify the express provisions of the Act which grant EPA *discretionary* authority, under the exceptional circumstance of an interstate water quality dispute, to consider the standards of a downstream state and tailor more stringent permit conditions as "necessary" to protect against an "undue impact" on downstream state water qualilty.[15]

[15] Although the issue is not necessary to a decision in the present case, industry *amici* believe that, in order for EPA to give "federal effect" to a downstream state's water quality standards in the context of resolving an interstate water quality dispute, EPA must comply with procedural requirements akin to those associated with "federal stand-

B. Federal Approval of a § 303(c) "Affected State" Standard Does Not Make It A "Federal Standard"

If downstream state standards are not generally applicable to an out-of-state source under §§ 301(b)(1)(C), 303(c), or 510, the only other way they might be considered generally applicable to an out-of-state source is if they are "federal standards." Not surprisingly, the Tenth Circuit attached special significance to the "federally-approved" water quality standards of an affected downstream state. That is, federal approval of a downstream state standard was considered by the Tenth Circuit to give it greater status than a mere "recommendation" with respect to an out-of-state source. 908 F.2d at 602, n.5, 607, and 608. Indeed, the Tenth Circuit made no distinction at all between federally-*approved state* standards, which must respect state boundaries, and federally-*promulgated* standards, which may apply across state lines.

The Act, however, gives no special status to downstream state "objections" or "recommendations" which are based on a downstream state's "federally-approved" standards. Since the Water Quality Act of 1965 at least, all state water quality standards must meet minimum federal requirements and must be federally approved. In addition,

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ards" *promulgation* under § 303(c)(4), or those required when EPA establishes a water quality related effluent limitation under § 302 of the Act. It is difficult to distinguish, in substance or effect, an EPA decision resolving an interstate water quality dispute from an EPA determination that it is necessary to promulgate "federal standards" for that waterway under § 303(c)(4). Like setting federal standards under § 303(c)(4), EPA's resolution of an interstate water quality dispute results in the designation of certain standards which thereafter will apply *generally* to all present and future discharges to that particular interstate waterway. There is no reason to believe the Act allows EPA simply to *declare*, without more, that certain standards will apply to all present and future discharges to a particular interstate waterway. See note 16, *infra*, regarding a 1977 EPA General Counsel's opinion which suggests that (in 1977, at least) EPA might well have reached this same conclusion.

EPA has seldom if ever failed to "approve" state-submitted standards which are more stringent than those necessary to meet the Clean Water Act's water quality requirements.

If all EPA-approved downstream state standards are "federal standards," and always have been as the Tenth Circuit apparently believes, EPA long ago would have been required to adopt rules and procedures to *insure* that such "federal standards" be met in every case of a potential downstream state impact. That EPA has not done so, in more than 25 years of administering federal water quality legislation, strongly indicates that EPA itself has never considered federally-approved downstream state standards to be "federal standards" or generally applicable requirements with respect to an out-of-state source.[16] Thus, to the extent the Tenth Circuit's grant of mandatory compliance status to affected downstream state standards is tied to their "federally-approved" status, the lower court has given far greater significance to the effect of federal approval than does EPA or the statute itself.[17]

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[16] In 1977, EPA's General Counsel issued a legal opinion directly addressing the question of whether EPA's approval of a state water quality standard creates a "federal standard." The EPA General Counsel, in an opinion which has not since been superseded, ruled that it does *not*, for the following reasons: "[T]he Act in Sec. 303 contains no language suggesting that an approval creates a federal standard. Moreover, in view of the unusual nature of such an action, we do not believe that a statute should be read to provide for establishing Federal regulations by EPA embracing a State regulation through a simple approval, i.e., without following the normal approach of proposing and promulgating regulations independently, unless there is a clear statutory directive or necessity for such an interpretation." Revision of Water Quality Standards and Implementation Plans Under Sec. 303 of the Federal Water Pollution Control Act, Op. EPA General Counsel, No. 58 (March 29, 1977).

[17] By giving automatic "federal effect" or mandatory *out-of-state* compliance status to all EPA-approved § 303 state water quality standards, the lower court would essentially repeal Congress' express directive in

III. The Tenth Circuit's Decision Gives Preeminent Status To "Affected State" Standards, Contrary To This Court's Construction Of The Act In *Ouellette*

The Tenth Circuit's decision makes a virtual mockery of this Court's construction of the Clean Water Act in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). In analyzing both of the statutory provisions which grant EPA *discretionary* authority to resolve water quality disputes among states, this Court's unambiguous conclusion was that "affected States occupy a subordinate position to source States in the federal regulatory framework." 479 U.S. at 491. In the case of an EPA-issued permit, as here, this Court clearly recognized EPA's discretionary authority with respect to downstream state standards in stating that an affected downstream state "only has an *advisory role* in regulating pollution that originates beyond its borders." 479 U.S. at 490 (emphasis added). In the case of a permit issued by the source state, instead of EPA, this Court also clearly read the Act as giving EPA the discretion to accept a downstream state's "recommendation" and disapprove the proposed permit *if* EPA determines that the proposed discharge "will have an *undue impact* on interstate waters." 479 U.S. at 490-91 (emphasis added).

The Tenth Circuit's decision, however, gives any downstream state which chooses to adopt water quality standards which are more stringent than the Clean Water Act requires (or which are different from or more stringent than source state requirements) a *preeminent* position in the federal regulatory framework. In doing so, the lower court not only ignores this Court's confirmation of the preeminent status of the *source state's* permit standards

§ 303(c)(3) that EPA-approved state standards generally apply only to the waters "of that State," and would effectively repeal as well Congress' §§ 401(a)(2) and 402(d)(2) grant of *discretionary* authority to EPA to determine that giving effect to a downstream state standard may be "necessary" under the facts of a particular case.

and policy choices,[18] but it also creates an implausible inconsistency in the statute concerning EPA's authority to resolve water quality disputes among neighboring states.

A. Compliance With "Affected State" Standards Cannot Rationally Be Mandatory When EPA Is The Permit-Issuer, But Discretionary When The Source State Is The Permit-Issuer

As interpreted by the Tenth Circuit, § 401(a)(2) absolutely *requires* that the permit insure compliance with affected downstream state standards when EPA is the permit-issuer, as here. When a source state is the permit-issuer, however, EPA's authority under § 402(d)(2) to require compliance with downstream state standards is clearly *discretionary*, as confirmed by this Court in *Ouellette* and acknowledged by the lower court as well (908 F.2d at 611). Thus, under the Tenth Circuit's reasoning, EPA has no alternative but to apply downstream state requirements when EPA issues the permit, but when a source state issues the permit EPA may or may not choose to apply downstream state requirements.[19] It is irrational

[18] "[I]t is not surprising that the Act limits the right to administer the permit system to the EPA and the source States. . . . If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State." *Ouellette*, 479 U.S. at 495.

[19] In recognizing that § 402(d)(2) grants EPA *discretionary* authority to consider imposing additional downstream state requirements when a source state issues the permit—and thus § 402(d)(2) conflicts with the lower court's perception of EPA's *non-discretionary* duty to apply downstream state requirements under § 401(a)(2) when EPA issues the permit—the Tenth Circuit obviously was obliged to explain this apparent inconsistency it found in the statute. The lower court did so by taking the position that § 402(d)(2)—like the court's interpretation of § 401(a)(2)—*requires* EPA, once EPA decides merely to *review* a source-state proposed permit, to insist that the permit comply with the standards of affected downstream states. 908 F.2d at 611, n.19. In contrast to this Court's *Ouellette* discretionary "undue impact" standard for

and thus implausible that Congress intended compliance with downstream state requirements to be compulsory when EPA is the permit-issuer, but discretionary when the source state is the permit-issuer.[20]

Far more plausible and consistent with the statute as a whole, as well as this Court's construction of the Act in *Ouellette*, is an intent of Congress that EPA *always* has discretion to determine whether additional or more stringent conditions are "necessary" to protect the water quality of an affected downstream state. This Court's "undue impact" standard in *Ouellette* unquestionably is an appropriate characterization of EPA's duty to *consider* the application of (but not automatically apply) a downstream state standard "as may be necessary." Among other things, an undue or unacceptable impact test preserves the statutory preeminence of source state requirements, without denying downstream states their statutorily-provided opportunity to convince EPA that compliance with additional

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EPA's review authority under § 402(d)(2), the Tenth Circuit thus interpreted EPA's § 402(d)(2) review authority as being limited to simply confirming whether or not any downstream state requirements would be violated. Thus, if one accepts the Tenth Circuit's reasoning, EPA does not actually have any "undue impact" discretion to exercise under § 402(d)(2) once EPA decides to "review the impact" of the proposed discharge. The only way for EPA to avoid the need to comply with downstream state requirements under § 402(d)(2) would be for EPA to stay completely out of the interstate dispute, and thus defer to the source state.

[20] Source states with EPA-approved permit programs have considerable flexibility regarding the terms and conditions of individual permits, including the acceptance of any recommendations made by a downstream state, but whether or not a downstream state's requirements *must* be met is not within the power of the source state (or the downstream state) to determine. The statute grants that authority exclusively to EPA, to be exercised on a case-by-case basis.

It is significant to recall here as well that § 402(a)(3) of the Act (see note 10, *supra*) requires EPA to apply the *source state's* permit standards whenever EPA is the permit-issuer under § 402(a).

or more stringent downstream state requirements should be found "necessary" in a particular case.

B. As This Court Found In *Ouellette*, The Act's "Savings Clause" Does Not Preserve Rights Under The Law Of An "Affected State"

It is clear from this Court's opinion in *Ouellette*, as well as the Court's earlier pronouncements in *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981), that Congress intended the Clean Water Act to be comprehensive and thus preempt or "dominate the field" of water quality regulation. 479 U.S. at 492. The central issue in *Ouellette* was whether, in light of the Act's generally preemptive federal regulatory scheme—but simultaneous preservation in § 510 of the right of a state to regulate its own waters more stringently, as well as the right of any person to seek enforcement of any state statutory or common law right under § 505(e)—Congress intended to "save" a right to bring suit under the common law of an *affected state*. The Court found that Congress did *not* intend these provisions to save the law of an affected downstream state.[21] In fact, the Court found that the Act's goals and policies, as extensively examined by the Court, indicate that Congress intended just the opposite—to *preempt* an action based on the law of an affected state.[22]

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[21] Of particular importance to the present case, the Court noted in *Ouellette* that § 510's more-stringent-regulation saving clause arguably applies only to "discharges flowing *directly* into a state's own waters, *i.e.*, discharges from within the State." 479 U.S. at 493 (emphasis in original). Moreover, the Court stated that § 505(e) itself does not "purport to preclude preemption of state law by other provisions of the Act." *Id.* Thus, the Act's savings provisions—while preserving certain rights in the *source* state—do not preclude federal preemption of the law of an affected downstream state.

[22] In 1986, the State of Tennessee sought to enforce its state water quality standards and common law remedies against Champion's Canton, North Carolina mill discharge. The Supreme Court of Tennessee ruled—consistent with the Seventh Circuit's opinion in *Illinois v. City*

There is nothing in this Court's analysis of the Clean Water Act in *Ouellette*, or in the Act itself, to suggest that any different conclusion should be reached regarding a downstream state's water quality statutes and regulations. The very same comprehensive federal regulatory scheme—including an express grant of EPA discretionary authority to resolve interstate water quality disputes and to consider downstream state law requirements "as may be necessary"—clearly indicates that Congress did not intend the water quality laws and regulations of downstream states to govern automatically in every case. In other words, Congress' express provision of an exclusive EPA forum to resolve applicable water quality standards disputes for interstate waterways leaves no room for the assertion of any downstream state "rights" with respect to the application of differing or more stringent downstream state law requirements against an out-of-state source.

IV. The Tenth Circuit's Ruling Lacks The Necessary Support Of A Clear And Unmistakable Statutory Authorization For An "Affected State" To Regulate Commerce Occurring Outside Its Borders

The only way the Tenth Circuit's ruling giving preeminent, mandatory compliance status to affected downstream state standards could be legally sustained—as a

of Milwaukee, 731 F.2d 403, 414 (7th Cir. 1984) *cert. denied sub nom., Scott v. City of Hammond*, 469 U.S. 1196 (1985)—that Tennessee could not bring an action to enforce its law against Champion's out-of-state discharge. *State v. Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986). In 1987, this Court granted Tennessee's petition for writ of *certiorari* and remanded the case for further consideration in light of this Court's decision in *Ouellette*. *Tennessee v. Champion Int'l Corp., cert. granted, judgment vacated and remanded*, 479 U.S. 1061 (1987). The Supreme Court of Tennessee subsequently granted a voluntary nonsuit, without prejudice to any claims Tennessee might assert under the Clean Water Act as construed by this Court in *Ouellette*. No subsequent state law enforcement action has been brought by Tennessee regarding Champion's North Carolina discharge.

matter of Commerce Clause law, if not proper statutory construction—would be if, as an element the Act's comprehensive scheme of federal regulation, Congress had *expressly and unmistakably granted* downstream states the power to control out-of-state discharges, and thus interfere with out-of-state commercial activities in the manner which the Tenth Circuit's ruling clearly allows. In short, absent the finding of such an express delegation by Congress, the lower court's decision violates well-established Commerce Clause principles.

State-of-the-art industrial water usage and treatment practices are such that virtually every industrial plant of every size and kind must discharge at least some wastewater effluent after it is treated to meet the requirements of the Clean Water Act. The power to regulate or prohibit industrial discharges, therefore, is the power to regulate or prohibit industrial activity itself.

Oklahoma's adoption of a "non-degradation" standard in the Illinois River *at the Arkansas-Oklahoma state line*, as applied by the Tenth Circuit, represents an assertion of downstream state power to prohibit upstream state discharges. The question here is whether Congress plainly and unmistakably granted downstream states, such as Oklahoma in this case, the power unilaterally to interfere with or prohibit commerce in another state.[23]

Such an express downstream state power to burden interstate commerce cannot reasonably be said to exist on

[23] Congress is free to authorize state-law intrusions upon interstate commerce, but any such delegation of Congress' exclusive authority over interstate commerce must be "expressly stated." *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982). Courts have been hesitant to find that Congress intended to abandon Commerce Clause protections, requiring that such an intent be "unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984); *accord Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985) (requiring "plain authorization" by Congress).

the face of the statute, for all the reasons previously discussed. It is evident from the lower court's own extensive and somewhat strained analysis of the Act that the Tenth Circuit also could not find in the statute any *plain* or *unmistakable* delegation of such power to downstream states.[24] Nor is it sufficient for a court to infer such power from the statutory purposes or the legislative debates.[25]

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[24] If such an affected downstream state power had been intended, Congress might easily have written expressly into the statute that which the Tenth Circuit was able to find only by inference. In § 301(b)(1)(C), for example, Congress easily could have incorporated by reference "any applicable requirements pursuant to § 401(a)(2)" to make it clear that any different or more stringent requirements of affected downstream states must be achieved. Congress also could have provided in § 401(a)(2) that, where the proposed discharge affects downstream state waters, no permit may be issued unless the affected state *certifies* (like the source state must) that its applicable water quality requirements will be met. Congress did not include in the statute any such provisions, but instead granted EPA express discretion to consider impacts on downstream state waters as they might arise in a particular case.

[25] The Tenth Circuit's decision would raise Commerce Clause issues even if Congress had not clearly intended the Clean Water Act to preempt the field of water quality regulation, and had not expressly provided an exclusive EPA forum for resolving interstate water quality disputes. The "dormant" Commerce Clause limits state action just as surely as express federal preemption. *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534-35 (1949). In such a case, the propriety of state action under the Commerce Clause must be assessed by balancing the local benefits to the regulating state against the burdens placed on interstate commerce. State action which is facially discriminatory against out-of-state businesses is subject to particular scrutiny. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (states bear the burden of demonstrating that no less discriminatory alternatives exist). Even state action which is "even-handed," however, must be examined closely in a dormant Commerce Clause situation to determine whether "the burden imposed on such [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). No such benefits-burdens evaluation was undertaken by the Tenth Circuit here, further indicating that the lower court ignored the Commerce Clause implications of its decision, as well as the broad federal preemption basis of this Court's decision in *Ouellette*.

When Congress has spoken clearly and unmistakably to the contrary by providing an exclusive, case-by-case, EPA forum for resolving interstate water quality disputes, no court should be allowed to grant a downstream state the power to interfere unilaterally with permitting decisions in the source state.

EPA's role in issuing permits for discharges to interstate waterways, and EPA's role in resolving water quality disputes concerning discharges to interstate waterways, was not intended by Congress to be reduced to a mechanical process of simply applying, whenever they are different or more stringent, the EPA-approved standards of affected downstream states. There is thus no basis for the lower court's conclusion that downstream state standards occupy a position of preeminence (or even occupy an equivalent status with source state standards) in the federal regulatory framework.

V. The Tenth Circuit's Absolute Prohibition Of New Discharges To Waters Not Meeting Water Quality Standards Lacks A Proper Statutory Basis

Compounding the error of giving preeminent, mandatory compliance status to affected downstream state standards, the Tenth Circuit also misread the Act as absolutely prohibiting any new or increased discharges to a waterway which is not currently meeting the downstream state's (or the source state's) water quality standards.

While it is true that a stated "goal" of the Act is the elimination of discharges of pollutants, it is equally undeniable that the specific substantive provisions of the Act do not require such elimination and that the Act allows each state to decide for itself how far and how fast it will move towards achieving that goal. The Act has never been interpreted by EPA, or by any court heretofore, to require an absolute ban on new or increased discharges in order to achieve the Act's goals, whether at the behest of a downstream state or not.

In support of its conclusion that such a prohibition exists in the Act, the Tenth Circuit relied almost exclusively upon its "common sense" understanding of the Act's goals and purposes and the "absurdity" of a policy that would allow a new discharge—including one whose individual impact is undetectable—to be made into a waterway which is not currently meeting applicable water quality standards. 908 F.2d at 631-32. The absence of "an *explicit* imprimatur" in the statute (908 F.2d at 632, emphasis in original) for the court's *absolutist* ruling, however, obviously cannot be overlooked.

The "national goal" of eliminating the discharge of pollutants into navigable waters by 1985, upon which the lower court placed so much emphasis (908 F.2d at 630-32), has not been achieved by 1991 and by many accounts may not ever be achieved. Nor should undue weight be given to the equally slippery notion, adopted by the Tenth Circuit, that EPA's "watchful role" and other responsibilities as custodian of the navigable waters is sufficient to "subsume the power [or duty] to prohibit any new discharge of pollution, regardless of the magnitude of its impact, where the existing quality of the receiving waters does not meet required standards."[26]

It is illogical to conclude that EPA's powers or duties under the Act are unlimited when it comes to regulating or prohibiting new discharges, but are severely restricted when it comes to determining the applicable standards for discharges to interstate waterways. Industry *amici* submit that, based on the discretionary federal balancing process set out in the interstate dispute resolution provisions of the Act (as well as the Commerce Clause balancing test,

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[26] 908 F.2d at 634. More than a matter of proper statutory construction, as discussed previously the Commerce Clause also does not allow the out-of-state application of a broadly prohibitive "non-degradation" or similar *downstream state* water quality standard without express authorization by Congress.

if express federal preemption is found not to exist), the Tenth Circuit got it exactly backwards. The statute explicitly grants EPA discretion to determine the "applicable water quality requirements" for discharges to interstate waterways when a dispute arises among neighboring states, whether EPA itself or the source state is the permit-issuer. The statute imposes no strict duty and confers no broad authority upon EPA (and certainly not upon a downstream state) to ban all new or increased discharges to waterways not currently meeting water quality standards.

Indeed, the breadth of EPA's duties and the scope of EPA's authority in both of these respects cannot be more aptly described than by asking, in the words of this Court in *Ouellette*: Does the proposed discharge, in EPA's judgment, have an "undue impact" or unacceptable effect on the waters in question? Requiring EPA to apply automatically the additional or more stringent standards adopted by an affected downstream state (or stay completely out of the interstate dispute, and thus defer to the source state), and requiring EPA to ban absolutely any new discharge to a waterway not currently meeting the applicable standards, robs EPA of the federal balancing role which Congress expressly granted EPA under the Act, as recognized by this Court in *Ouellette*.[27]

CONCLUSION

The Tenth Circuit's grant of automatic, mandatory compliance status to the federally-approved state water quality standards of affected downstream states—giving them preeminent status over federally-approved source state standards—is contrary to the Clean Water Act, this Court's broad federal preemption construction of the Act in *Ouellette*, and Commerce Clause principles as well.

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[27] Judicial review of EPA's exercise of that discretion, based upon a proper record of EPA's decision, is available to protect aggrieved parties against possible abuse.

The lower court's absolute ban on new discharges to waterways not currently meeting applicable water quality standards is without any proper statutory basis.

For the foregoing reasons, *amici curiae* Champion International Corporation, American Paper Institute, National Forest Products Association, American Iron and Steel Institute, American Mining Congress, The Fertilizer Institute, Chemical Manufacturers Association, National Association of Manufacturers, Associated Industries of Arkansas, Arkansas Federation of Air and Water Users, Inc., and Arkansas Poultry Federation respectfully urge the Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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